JOHNSON TAN HAN SENG v. PUBLIC PROSECUTOR
SOON SENG SIA HENG v. PUBLIC PROSECUTOR
PUBLIC PROSECUTOR v. CHEA SOON HOONG
TEH CHENG POH v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) March 26, 1977]
[Kuala Lumpur — Federal Court Criminal Appeal Nos. 39, 40, 43 and 46 of 1976]

Criminal Law and Procedure — Security offences — Security Cases — Validity of the Essential (Security Cases) Regulations, 1975 — Whether Proclamation of Emergency issued in 1969 still in force — Proclamation of security area — Whether charge should refer to relevant proclamation — Power of Attorney-General — Whether Attorney-General may discriminate between persons in charging them with offences — Whether acted mala fide in charging accused under Internal Security Act for possession of firearm or ammunition — Scope of Internal Security Act — Whether preamble can be used to limit scope — Whether power of Attorney-General can be exercised by a Deputy Public Prosecutor — Admissibility of statements given to Police — Serviceability of firearm — Essential (Security Cases) Regulations, 1975 — Internal Security Act, 1960, ss. 2, 47 and 57 — Criminal Procedure Code, (F.M.S. Cap. 6), s. 376 — Federal Constitution, Articles 8, 145(3).

Attorney-General — Power to discriminate — Public interest.

Emergency — Essential (Security Cases) Regulations, 1975 — Whether ultra vires.

Evidence — Cautioned statement — Admissibility.

Evidence — Proclamation — Court bound to take judicial notice — Evidence Act, 1950, s. 57(1)(a).

Constitutional Law — Fundamental liberty — Equality — Power of Attorney-General — Federal Constitution, Articles 8 and 145(3).

The four appeals were heard together as some of the grounds of appeal overlap. In Criminal Appeal No. 40 the accused had been sentenced to death for the offences of possession of firearm contrary to section 57 of the Internal Security Act. The accused in Criminal Appeal No. 46 had similarly been sentenced to death. In Criminal Appeal No. 39 the accused had been sentenced to life imprisonment for the offence of consorting with the accused in Criminal Appeal No. 40. In Criminal Appeal No. 43 the accused was acquitted of the offences of possession of firearm and ammunition contrary to section 57 of the Internal Security Act. The main points taken on behalf of all the accused were —

(1) that the Essential (Security Cases) Regulations, 1975 by virtue of which the accused were tried were void because the Emergency (Essential Powers) Ordinance No. 1 under the authority of which the regulations were made, had lapsed and ceased to be law by effluxion of time and by force of changed circumstances;

(2) that the Essential (Security Cases) Regulations, 1975, were *ultra vires* the Emergency (Essential Powers) Ordinance as it was alleged that the Yang Dipertuan Agung had sub-delegated his powers to the Attorney-General;

(3) that there was no evidence to show that the areas concerned were "security areas" and that reference should have been made in the charges to the proclamation making the areas "security areas";

(4) that the power given to the Attorney-General to discriminate as between persons alleged to be in possession of firearms or ammunition and charging them with different offences contravenes Article 8 of the Federal Constitution and is therefore void;

(5) that there had been *mala fides* when the Attorney-General elected to charge the accused under the Internal Security Act;

(6) that the powers of the Attorney-General should have been exercised by him personally and not by a Deputy Public Prosecutor;

In Criminal Appeal Nos. 39 and 40, it was argued that the statements made by the accused under caution to the police should not have been admitted in evidence.

In Criminal Appeal No. 43, it was argued that as the evidence showed that the pistol "did not fire off" the ammunition inserted in it, it was not a firearm within the meaning of section 2 of the Internal Security Act.

Held: (1) the 1969 Proclamation of Emergency has not been revoked nor annulled by Parliament. The Emergency (Essential Powers) Ordinance has not been revoked or annulled. Therefore they are still in force;

(2) even if there has been sub-delegation by the Yang Dipertuan Agung, the Essential (Security Cases) Regulations, 1975 were not *ultra vires* the Emergency (Essential Powers) Ordinance as they come within the language of regulation 2(1) and 2(2) of the Ordinance;

(3) by virtue of the Proclamation P.U.(A) 148/68 the Yang Dipertuan Agung had proclaimed all areas in the Federation to be security areas for the purposes of Part II of the Internal Security Act and by virtue of section 12 of the Revision of Laws Act, 1968, under which the Internal Security Act had been revised, references to Part II should be read as references to Part III of the revised Act;

(4) under section 57(1)(a) of the Evidence Act, the court is bound to take judicial notice of all laws and regulations and therefore by virtue of section 56 of the Act, the Proclamation in this case need not be proved nor the fact that the locus in each case was in the Federation. Although ideally the prosecution should quote the Proclamation in the charges to help the defence and the courts, failure to do so is not fatal;

(5) the Attorney-General has power to discriminate between persons alleged to be in possession of firearms or ammunition and to charge them differently. As in England, the Attorney-General in Malaysia is permitted to take into account the public interest when deciding what charge or charges to prefer against an accused;

(6) the Attorney-General was not acting *mala fide* in charging the accused under the Internal Security Act, as the accused came within the scope of sections 57 and 58 of the Internal Security Act;

(7) in Criminal Appeal Nos. 39 and 40, the learned trial judge should not have ruled that the cautioned statements were admissible until he had heard the evidence of and on behalf of the accused on this issue and considered their counsel's submissions. As the only evidence that the second accused knew that the first accused had a gun was contained in his cautioned statement and that of the first accused, it would be unsafe to allow his conviction to stand and therefore his appeal would be allowed and his conviction quashed;

(8) in Criminal Appeal No. 43, the evidence showed that the pistol could be adapted for the discharge of a bullet and therefore was a firearm within the meaning of section 2 of the Internal Security Act. In any event under regulation 21(b) of the Essential (Security Cases) Regulations, 1975 (as amended) the firearm and ammunition are deemed to have been serviceable and the onus of proof to the contrary was on the accused.

Cases referred to:-

(1) *Willcock* v. *Muckle* [1951] 2 K.B. 844.

(2) *In re Petition of Earl of Artrim and eleven other Irish Peers* [1966] 3 W.L.R. 1141.

(3) *King* v. *Governor of Wormwood Scrubs Prison* [1920] 2 K.B. 305.

(4) *Bhut Natha Mate* v. *State of West Bengal* A.I.R. 1974 S.C. 806.

(5) *King* v. *Halliday* [1917] A.C. 260.

(6) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 2 M.L.J. 238; [1970] A.C. 379.

(7) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.
(8) *Samivellu* v. *Public Prosecutor* [1972] 1 M.L.J. 28.
(9) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116.
(10) *Public Prosecutor* v. *Oh Keng Seng* [1976] 2 M.L.J. 125.
(11) *Public Prosecutor* v. *Su Liang Yu* [1976] 2 M.L.J. 128.
(12) *Long bin Samat* v. *Public Prosecutor* [1974] 2 M.L.J. 152.
(13) *Smedlys Ltd.* v. *Breed* [1974] 2 All E.R. 21.
(14) *Re Tan Boon Liat* [1976] 2 M.L.J. 83.
(15) *Sulong bin Nain* v. *Public Prosecutor* [1947] M.L.J. 139.
(16) *Ismail bin Haji Ibrahim* v. *Public Prosecutor* [1949] M.L.J. 139.
(17) *Public Prosecutor* v. *Muniandy* [1963] M.L.J. 147.
(18) *Lim Eng Koi* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 63.
(19) *Brown* v. *Magistrates of Edinburgh* [1931] S.L.T. 456, 458.
(20) *Liversidge* v. *Anderson* [1942] A.C. 206 at pp. 252, 253.
(21) *Mutual Film Corporation* v. *Industrial Commission of Ohio* (1915) 236 U.S. 230, 245.
(22) *R.* v. *Halkett* [1910] 1 K.B. 50.

FEDERAL COURT.

In F.C. Criminal Appeal No. 39/76.

R. Rajasingam for the appellant.

Datuk Mohamed Yusof bin Abdul Rashid (Deputy Public Prosecutor) for the respondent.

In F.C. Criminal Appeal No. 40/76.

Chew Kar Yee for the appellant.

Datuk Mohamed Yusof bin Abdul Rashid (Deputy Public Prosecutor) for the respondent.

In F.C. Criminal Appeal No. 43/76.

Datuk Mohamed Yusof bin Abdul Rashid (Deputy Public Prosecutor) for the appellant.

Jagjit Singh for the respondent.

In F.C. Criminal Appeal No. 46/76.

Karpal Singh for the appellant.

Datuk Mohamed Yusof bin Abdul Rashid (Deputy Public Prosecutor) for the respondent.

Suffian L.P.: These four appeals were argued one after another in the combined hearing of all counsel involved, as some of the grounds of the appeal overlap.

In appeal No. 40 the accused was sentenced to death for the offences of possession of firearm contrary to section 57(1)(a) and of ammunition contrary to section 57(1)(b) of the Internal Security Act, Act 82 ("ISA"). Similarly, the accused in appeal No. 46. In appeal No. 39, the accused was sentenced to life imprisonment for the offence of consorting with the accused in appeal No. 40 contrary to section 58(1) ISA. In appeal No. 43 the accused was acquitted of the offences of possession of firearm and ammunition contrary to section 57(1)(a) and (b) ISA.

Offences against sections 57 and 58 of ISA are security offences and cases against all the accused are therefore security cases, see regulation 2(1) of the Essential (Security Cases) Regulations, 1975 ("the 1975 regulations" or "the regulations"), published as P.U.(A) 320 and amended by P.U.(A) 362 in 1975, and so by virtue of regulation 3 of the regulations they were tried in accordance with the special rules of procedure and evidence prescribed by the regulations.

Validity of 1975 regulations.

The first point taken on behalf of all the accused is that the regulations are void because the Emergency (Essential Powers) Ordinance No. 1, ("the Ordinance") published as P.U.(A) 149/69, under authority of which the regulations were made, had itself lapsed and ceased to be law by effluxion of time and by force of changed circumstances.

To appreciate this argument it is necessary to state that under clause (1) of article 150 of the Constitution if the Yang di-Pertuan Agong is satisfied that a grave emergency exists he may issue a proclamation of emergency and that a day or two after the general election in 1969 there were serious riots in Kuala Lumpur and in one or two other areas and His Majesty acting on responsible advice proclaimed an emergency, see P.U.(A) 145/69 ("the 1969 proclamation"). That was on May 15, 1969, and on the same day His Majesty also promulgated the Ordinance, *inter alia*, giving himself power to make essential regulations which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community, and it is in exercise of this power that in 1975 His Majesty made the regulations.

Counsel accept the validity of the 1969 proclamation at the time when it was made in view of the serious situation then prevailing, but submit that since then and by 1975 the situation has changed, is no longer serious, that the then Yang di-Pertuan Agong has been succeeded by two other Yang di-Pertuan Agongs, that another general election has been held, and that in view of all this it cannot be said that there is any longer any necessity and basis for an emergency, and that if there is, then His Majesty should have been advised to issue a fresh proclamation, as he did in 1966 to deal with the political crisis arising out of the action of Datuk Stephen Kalong Ningkan, see [1968] 2 M.L.J. 238, though there was already then the 1964 proclamation of emergency still in existence to deal with Indonesian confrontation. It is submitted that it was necessary to issue a fresh proclamation of emergency in 1966 because the 1964 proclamation had expired due to the normalization of relations between us and Indonesia, and that if in 1966 it was necessary to proclaim an emergency afresh to deal with the Datuk, then surely in 1975 it should have been necessary to issue a fresh proclamation that year to deal with people carrying firearms, notwithstanding the existence of the 1969 proclamation, and the failure to do so invalidates the 1975 regulations.

Harun J. in the case out of which arises appeal No. 43 is also of the view that the 1969 proclamation has lapsed and is no longer in force. He said:—

"It will be ridiculous in the extreme to prosecute any person to-day for an offence under the Internal Security Act with reference to the 1964 Proclamation [to deal with Indo-

nesian confrontation]. In *Willcock* v. *Muckle*,[1] Lord Goddard C.J., at p. 851 said: 'This Act [the National Registration Act, 1939] was passed for security purposes; it was never passed for the purposes for which it was apparently being made. To use Acts of Parliament passed for particular purposes in wartime when the war is a thing of the past — except for the technicality that a state of war exists — tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs.'

In the same case, Devlin J. at p. 853 said:—

'I think that it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.'

If I am correct in holding that the 1964 Proclamation has lapsed, the question arises whether the same can be said for the 1969 Proclamation. On the facts it is clear that the tragic events of May 13, 1969 and the weeks that followed are a thing of the past. The occasion for which the Proclamation P.U.(A) 148 [declaring all areas in the Federation as security areas for the purposes of ISA] was made was for particular purposes which no longer exist, at least not on February 9, 1976, when this alleged offence was committed. It is now more than seven years after these unhappy events and I must hold that the 1969 Proclamation has also lapsed. In the Petition of the *Earl of Antrim and Eleven Other Irish Peers*,[2] Lord Reid at page 1149 said: 'A statutory provision becomes obsolete if the state of things on which its existence depended has ceased to exist so that its object is no longer attainable'."

With respect I do not agree that the 1969 proclamation and the Ordinance have lapsed and are no longer in force. In the words of clause (3) of article 150 "a proclamation of emergency and any ordinance promulgated under clause (2) . . . if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses [of Parliament] annulling such proclamation or ordinance . . .", and in the words of clause (7) of the same article "At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation . . . shall cease to have effect . . .". In my view these words mean —

(1) that a proclamation of emergency ceases to have effect only —
   (a) if revoked or
   (b) Parliament by resolution annuls it; and

(2) that an ordinance ceases to have effect if —
   (a) revoked, or
   (b) Parliament by resolution annuls it, or further
   (c) if the proclamation in pursuance of which it was promulgated has ceased to have effect and six months have elapsed.

The 1969 proclamation has not been revoked nor annulled by Parliament. The ordinance has not been revoked nor annulled. Therefore in my view they are still in force.

As regards the first case[1] cited by Harun J., there the question was whether the National Registration Act, 1939, which provided by section 12(4) —

"This Act shall continue in force until such date as His Majesty may by order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end. . . ."

was still in force when in pursuance of the Courts (Emergency Powers) (End of Emergency) Order, 1950, it was declared that October 8, 1950, was the date on which the emergency which was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, came to an end; and it was held that the Act had not come to an end, as there could be *different* aspects of the same emergency and that if the Crown had considered that a *particular* aspect no longer existed, so that the emergency which occasioned that particular Act to be passed had ended, it did *not* follow that all the Acts concerning *other* aspects of the same emergency were terminated. The remark quoted by Harun J. merely exhorted the authorities not to enforce the Act. It is not authority for the proposition that an Act of Parliament lapses by force of changed circumstances.

With regard to the remark of Lord Reid in the second case[2] cited by Harun J. in appeal No. 43, again I do not think that it is authority for the proposition put forward on behalf of the accused. There the question was whether in 1965 the peerage of Ireland had under the Union with Ireland Act, 1800, the right to be represented in the House of Lords, and it was held that they did not, since that Act had ceased to be effective, not simply because of changed circumstances, but because of the passing of the Irish Free State (Agreement) Act, 1922, which split Ireland into two (the Irish Free State and Northern Ireland), and furthermore by the passing in 1949 of the Ireland Act, 1949 which declared that the Irish Free State (since renamed Eire) had ceased to be part of His Majesty's dominions. Lord Reid said at page 1149:—

"As a result of these changes it appears to me to be clear that Ireland as a whole no longer exists politically. On the other hand, there has been no statutory alteration of the position of the Irish peerage or the rights of Irish peers. So if the Irish representative peers were elected to represent Ireland I cannot see how there could now be an election of a peer to represent something which no longer exists politically."

Then Lord Reid added the words quoted by Harun J.:

"A statutory provision becomes obsolete if the state of things on which its existence depended has ceased to exist, so that its object is no longer attainable."

After that sentence Lord Reid explained what he meant by saying

"Or putting it another way, a statutory provision is virtually or impliedly repealed *if a later enactment brings to an end a state of things the continuance of which is essential for its operation.*"

Here it cannot be said that a later enactment has brought to an end the state of things the continuance of which was essential for the operation of the 1969 proclamation and the Ordinance.

"In Scotland", according to The Dictionary of English Law by Earl Jowitt, pages 621-622, "an Act is said to fall into desuetude if, being of ancient date, it has for long been disregarded in practice. The courts will not then give effect to it. The doctrine probably applies only to Acts of the *Scots* Parliament."

The position in England, however, is different. *Maxwell* on the Interpretation of Statutes, 12th Edition, states at page 16 —

"A law is not repealed by becoming obsolete: there is no doctrine of desuetude in English law. So until 1844 it was an indictable offence to sell corn in the sheaf before it had been thrashed out and measured, and as late as 1836 insolvents in Scotland were bound to wear a coat and cap

half yellow and half brown. The Profane Oaths Act, 1745, which punished profane cursing and swearing by fines graded [according] to the social degree of the offender, was still in force in 1966, as were the canonical requirements as to the colour and material of night-caps worn in bed by clergy of the Church of England."

Support for this proposition may be found in *The King* v. *Governor of Wormwood Scrubbs Prison*.[3] There by section 1(7) of the Defence of the Realm (Amendment) Act, 1915, it was provided: "In the event of invasion or other special military emergency arising out of the present war, His Majesty may by proclamation forthwith suspend" the right of trial by jury in the case of offences committed against the regulations and leave the offenders to be tried by courts-martial, and it was held that when a special military emergency has once arisen and a proclamation suspending the right of trial by jury in Ireland has once been lawfully made, the operation of the proclamation is not limited to the duration of the emergency, but it remains in force till the end of the war unless revoked sooner. The Earl of Reading C.J. said at page 311:

"... it was said that the proclamation suspending trial by jury in Ireland ... had ceased to be operative, inasmuch as the 'special military emergency' which was the foundation of the power to make the proclamation had ceased to exist. The answer to that contention is that even if it is material to consider whether the military emergency has come to an end, it is not a matter which this court can consider: whether the emergency continues to exist or not it is for the *executive* alone to determine."

The law in India is the same as in England, as can be seen from a decision of the Indian Supreme Court in *Bhut Natha Mate* v. *State of West Bengal*.[4] There the question was whether the detention of the petitioner Mate was lawful or not and it was argued that it was unlawful because of seven grounds, one of them being because, it was said, "the detention has been arbitrary and may continue indefinitely if the Proclamation of Emergency becomes a constant fact of constitution life and must therefore be regarded as unconstitutional". Krishna Iyer J. delivering the judgment of the court said at page 811:

"16. We have to reject summarily [this] submission as falling outside the orbit of judicial control and wandering into the para-political sector. It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamental rights. In our view, this is a political, not justiciable issue and the appeal should be to the polls and not to the courts. The traditional view ... that political questions fall outside the area of judicial review, is not a constitutional taboo but a pragmatic response of the court to the reality of its inadequacy to decide such issues and to the scheme of the constitution which has assigned to each branch of government in the larger sense a certain jurisdiction ... The rule is one of self-restraint and of subject-matter, practical sense and respect for other branches of government like the legislature and executive."

The learned judge then cited in support *The King* v. *Wormwood Scrubbs Prison*,[3] *The King* v. *Halliday*[5] and a Privy Council decision on appeal from Malaysia, *Ningkan* v. *Government of Malaysia*.[6]

With respect I would say that the law of Malaysia is the same as that in England and India, that is that it is a matter for the executive to decide whether a proclamation of Emergency should or should not be terminated, and not for the courts.

The validity of the 1975 regulations is attacked on another ground, namely sub-delegation. Mr. Rajasingam in appeal No. 39 says that as to this he relies on a passage in the dissenting judgment of Ong F.J. in *Public Prosecutor* v. *Khong Teng Khen & Anor*.[7] That passage begins with the paragraph in the first column on page 174 commencing "I invited counsel for the defendants, etc." and ending with the paragraph in the second column on the same page commencing "Regulation 2(2) in both the 1975 regulations ...". As I understand the argument it runs on the following lines: by the Ordinance His Majesty has delegated to himself power to alter the mode of trial of persons offending against the regulations (made under that Ordinance) and by the 1975 regulations, regulation 2(2), His Majesty has sub-delegated this power to the Attorney-General. With respect I do not see merit in this argument. Even if it is true that there has been sub-delegation, which I do not think is the case, the 1975 regulations are *intra vires* the Ordinance, since, as explained by the majority judgments in *Khong*[7] they come within the language of regulation 2(1) of the Ordinance and in particular of paragraph (j) of regulation 2(2) which expressly provides that His Majesty may make essential regulations to —

"provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification."

Security areas

Under sections 47 and 57 ISA the acts committed by the accused are offences only if committed in a "security area" which means (section 2) an area proclaimed by His Majesty as a security area "for the purposes of *this* Part", meaning Part III of ISA in which the two sections 47 and 57 appear.

However by virtue of the proclamation P.U.(A) 148/69 His Majesty proclaimed all areas in the Federation to be security areas "for the purposes of Part *II* of [ISA]," not of Part III. Because of this Harun J. acquitted the accused in appeal No. 43. Since then, he states in his supplementary grounds of judgment, he has reconsidered this matter and is of the opinion that he was in error.

I agree that he was in error.

Originally ISA existed as the Internal Security Act No. 18 of 1960 and there sections 47, 57 and 58 appeared in Part II. P.U.(A) 148/69 was proclaimed under that Act. In 1972 when ISA was revised (it is now Act 82) these three sections were put in Part III of the revised Act. By virtue of section 12 of the Revision of the Laws Act, 1968, Act 1, under authority of which the revision was made, references in P.U.(A) 148/69 to Part II must be read as references to Part III of the revised Act.

Counsel before us do not seek to argue to the contrary but argue that the reference P.U.(A) 148/69 should have been quoted in the charges and the prosecution should have proved by evidence that the places in which these offences were supposed to have been committed were within security areas and the failure to do so was fatal, and for this proposition they rely on a decision of the High Court in *Samivellu* v. *Public Prosecutor*.[8] With respect I do not think that this case was correctly decided. Under section 57(1)(a) of the Evidence Act, the court is bound to

take judicial notice of all laws and regulations, which P.U.(A) 148/69 undoubtedly is, and therefore by virtue of section 56 of the same Act, P.U.(A) 148/69 need not be proved, nor the fact that the locus in every case was in the Federation. Mohamed Azmi J. fell into error in *Samivellu* because he had overlooked this section 56. Ideally the prosecution should quote P.U.(A) 148/69 in the charges, to help the defence and the courts, but failure to do so is not fatal. It is enough if the court's attention is directed to it and the *Gazette* produced, or even if the court of its own motion finds it for itself and has regard to it when considering its judgment. In my opinion the accused in *Samivellu* should not have been acquitted.

Power of the Attorney-General

A person thought to be in unlawful possession of firearms may be charged under the Arms Act (Act 21 of 1960), for which the maximum penalty is seven years, or under the Firearms (Increased Penalties) Act (Act 37), for which the maximum penalty is 14 years, or under section 57 ISA, for which the penalty is death. It is argued that if three persons (say *A*, *B* and *C*) are thought to be in unlawful possession of firearms, to give the Attorney-General power to charge *A* under the first Act, *B* under the second and *C* under the third, would be in breach of article 8 of the constitution which guarantees equality before the law in the following words:

"All persons are equal before the law and entitled to the equal protection of the law."

and counsel cited the decision of Abdoolcader J. in *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.*[9] in support, and submit that the decisions to the contrary of Ajaib Singh J. in *Public Prosecutor* v. *Oh Keng Seng*[10] and of Hashim Yeop A. Sani J. in *Public Prosecutor* v. *Su Liang Yu*[11] were wrong.

These three decisions were on the question whether or not the new section 418A of the Criminal Procedure Code was contrary to article 8 and therefore unconstitutional and void, and in considering the argument before us it is unnecessary for us to determine that question. Here we are asked to determine a different question, namely whether the Attorney-General may discriminate as between the three persons in the example given, or must he charge all three persons under the same statute. I am of the opinion that he may discriminate without contravening article 8.

A may have had a licence to possess his gun but delayed to renew it. It would have been proper for the Attorney-General to charge him simply under the Arms Act. *B* on the other hand never had a licence and has a criminal record. Must he also be charged under the Arms Act? I think that in today's conditions, when hardly a week goes by without some one being robbed by armed men, probably the Attorney-General would be accused of failing in his duty if he did not charge him under Act 37. *C* also may not have had a licence and may have had a very black record and have killed various people and terrorised witnesses so that few people are willing to come forward to report, let alone give evidence in open court against him. Should he also be charged only under the Arms Act simply because *A* is charged under that Act or under Act 37 like *B* or under ISA? I think that the choice is entirely the Attorney-General's.

The Attorney-General cannot name any particular magistrate, president or judge to try an accused nor direct that a court should convict or impose a particular sentence; but apart from this, he has very wide discretion under the Criminal Procedure Code and the constitution. Before *Merdeka* Chapter XXXVII of the F.M.S. Criminal Procedure Code and the equivalent provisions of the S.S. Criminal Procedure Code set out his power.. Today only the F.M.S. Code remains. Section 376(i) thereof provides generally that the Attorney-General in his capacity as Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the Code. The next nine sections particularize his powers.

For instance, under section 381 he may enter a *nolle prosequi* after he has received the record of a preliminary enquiry. As noted by this court in *Long bin Samat* v. *Public Prosecutor*[12] there was ample judicial authority before *Merdeka* to show that the Attorney-General enjoyed wide discretion in regard to criminal prosecutions. As section 376(i) of the Criminal Procedure Code was already in existence before merdeka our constitution-makers could have been content with relying on it alone to preserve after *Merdeka* the Attorney-General's pre-*Merdeka* power, and if they had done so then it might be arguable that after merdeka it must be read subject to article 8; but our constitution-makers were not content to do so. They deliberately wrote article 145(3) into our constitution, which reads:

"The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a native court or a court-martial."

The language of this provision is very wide, for it includes the word "discretion" which means liberty of deciding as one thinks fit. In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to article 8. Rather, in my view, the contrary: article 8 it is that must be read subject to article 145(3).

The corresponding article 76 of the Indian constitution dealing with the Attorney-General in India does not contain a similar provision, merely providing by clauses (2) and (3) that

"(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all courts in the territory of India."

When reading decisions of Indian courts on the effect of the equality provision, the absence of a provision similar to our article 145(3) should always be borne in mind.

In *Smedleys Ltd.* v. *Breed*[13] a House of Lords decision, there appear remarks which show that in England, when considering whether or not to prosecute, the Attorney-General should take into account the public interest. Viscount Dilhorne, a former Attorney-General, said at pages 32-3:—

"In 1951 the question was raised whether it was not a basic principle of the rule of law that the operation of the law is automatic where an offence is known or suspected. The then Attorney-General, Sir Hartley Shawcross, said:

'It has never been the rule of this country — I hope it never will be — that criminal offences must automatically be the subject of prosecution.'

He pointed out that the Attorney-General and the Director of Public Prosecutions only intervene to direct a prosecution when they consider it in the public interest to do so and he cited a statement made by Lord Simon in 1925 when he said:

'... there is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what lawyers call a case. It is not true and no one who has held the office of Attorney-General supposes it is.'

Sir Hartley Shawcross's statement was endorsed, I think, by more than one of his successors."

I am of the opinion that the position here is the same as in England, and further that our Attorney-General is permitted to take into account the public interest when deciding what charge or charges to prefer against an accused.

In *Long bin Samat* v. *Public Prosecutor*[12] we considered the question whether the Attorney-General may lawfully prefer a lesser charge when the evidence discloses a graver offence and we said that he can. There the evidence disclosed an offence of voluntarily causing grievous hurt by a dangerous weapon or means contrary to section 326 of the Penal Code, but the Attorney-General charged the accused with the lesser offence of voluntarily causing hurt by a dangerous weapon or means contrary to section 324 of the Penal Code, and we upheld his discretion. Indeed the Attorney-General could lawfully have charged the accused with even the much less serious offence of voluntarily causing hurt contrary to section 323. As we stated then, anybody who has a complaint against the Attorney-General for exercising his discretion in any particular way should direct it not to the courts but elsewhere.

The Attorney-General is in touch with the police and other investigating agencies, and he has information not available to the courts and on which to base his decision on whether or not to prosecute and if so on which charge. If in a case of causing hurt he can elect to proceed under section 324 when the evidence would have justified him proceeding under section 326, I am of the opinion that he can also lawfully proceed on an enhanced charge instead of a reduced charge, and if he can do that I am further of the opinion that if say *A*, *B* and *C* join together to attack *D* the Attorney-General can lawfully without breach of article 8 of the constitution charge *A* under section 323, *B* under section 324 and *C* under section 326 of the Penal Code, and if he can do that in regard to three provisions in the same statute he can do the same in regard to provisions in three different statutes.

In deciding that the Attorney-General is not constrained by article 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may act dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favouring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere and in the last resort by voting against the party of which he is a member. In England the Attorney-General's decision to withdraw the charge in the *Campbell Case* in 1924 resulted in a change of government, see chapters 10 and 11 of *The Law Officers of the Crown* by Professor J.Ll.J. Edwards.

Next it is said that there has been *mala fide* when the Attorney-General elected to charge the accused in these appeals under ISA which, it is argued, was intended to deal with subversive elements, when there is no evidence that these accused were in any way connected with subversive elements, and were at the most ordinary criminals. Reference is made by counsel to the long title and preamble of ISA which read:

"An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto.

[West Malaysia — 1st August, 1960;
East Malaysia — 16th September, 1963]

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia —

(1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and

(2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;

AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia;

AND WHEREAS Parliament considers it necessary to stop or prevent that action;

NOW therefore PURSUANT to Article 149 of the Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:"

With respect I do not think that there is merit in this argument, and agree with the principle so lucidly set out by Abdoolcader J. at page 85 in *Re Tan Boon Liat*[14] in the following words:

"Although the preamble is part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down ... by reference to it. It is ... settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity."

The same principle applies to long titles.

Here the enacting words of sections 57 and 58 ISA are very clear. They say "any person" etc., not

"any subversive person" etc., and clearly the accused all come within the scope of the two sections.

Still on the power of the Attorney-General, Mr. Jagjit Singh (counsel in appeal No. 43) complains that the certificate or consent for the prosecution should have been signed by the Attorney-General himself and the fact that it was signed by a mere Deputy Public Prosecutor shows *mala fides* on the Attorney-General's part. Frankly I do not see merit in this argument. Section 80 ISA says that a prosecution for an offence under the Act punishable with imprisonment for seven years or more shall not be instituted except with the consent of the Public Prosecutor and section 376 of the Criminal Procedure Code says that, subject to certain exceptions, which do not apply here, a Deputy Public Prosecutor may exercise the rights and powers of the Public Prosecutor.

So on none of the above points of law argued on behalf of the accused, am I in agreement with their counsel.

I now turn to each case in detail.

Criminal appeals Nos. 39 and 40. The accused in these two appeals were tried jointly — the accused in appeal No. 40, ("the first accused") was charged with unlawful possession of a pistol contrary to section 57(1)(a) and of ammunition contrary to section 57(1)(b) ISA and the accused in appeal No. 39 ("the second accused") who was arrested at the same time with consorting with the first accused contrary to section 58(1) ISA.

I do not think that there is any merit in appeal No. 40 and that appeal is accordingly dismissed. There the first accused was with the second accused and another in a car waiting to get on the ferry at Butterworth. The police ordered them to get out and they got out. The second accused and the third man were searched and nothing was found on them. While they were being searched, a detective (PW2) was frisking the first accused, suspecting that he had a gun, and the first accused tried to draw out a gun, but the detective grabbed him from the back and before anything serious could happen an Inspector (PW1) rushed out and disarmed the first accused. The first accused had, tucked into the waistband of his trousers, a .38 Colt Special with six live bullets in the chamber. On this evidence alone the learned judge was justified in finding the charges against him proved.

As regards the second accused, the prosecution had to prove among other things that he knew that the first accused had a gun. In evidence on oath he denied he knew. The only evidence that he knew was contained in a statement made under caution to the police by him and by the first accused. These statements were admitted by the learned trial judge under regulation 21 of the 1975 regulations which read:

"21. (1) A statement made by the accused whether orally or in writing to any person shall be admissible in evidence notwithstanding that such statement —

(a) was made to or in the hearing of a police officer provided that such police officer is not below the rank of an Inspector; or

(b) was made whilst the accused was in police custody or in the custody of any other person; or

(c) was made to a person in authority; or

(d) was made in the course of a police investigation (whether or not wholly or partly in answer to a question); or

(e) was made with or without a caution being administered under any written law relating to statements made after the administration of a caution to the person making the statement; or

(f) would incriminate the accused; or

(g) contains an admission or confession of guilt, or amounts to an admission or confession of guilt. . . ."

Regulation 21 does not say that a statement to a police officer is admissible whether made voluntarily or not, and so the prosecution must still prove that it was voluntarily made if they wanted to rely on it. As both accused hotly denied the voluntariness of their statements, there was a trial within a trial to decide this issue alone, and at the end of the prosecution evidence in this mini trial the learned judge made this note: "Court rules statements are admissible". With all due respect we do not think that despite the language of regulations 13 and 17 of the 1975 regulations which read as follows:

"13. When the case for the prosecution is closed, the court shall call on the accused to enter on his defence."

"17. The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge.",

the learned judge has followed the right procedure. Notwithstanding these two regulations, he should not have ruled that these statements were admissible until he had heard the evidence of and on behalf of the two accused on this issue and considered their counsel's submission. If then he ruled that they were not admissible, that would be the end of the matter as far as the statements were concerned. If on the contrary he ruled that they were admissible, then he would have to consider the weight to be given to them in the light of the whole of the evidence.

As the only evidence that the second accused knew that the first accused had a gun was contained in his statement and that of the first accused, we think that it is unsafe to allow his conviction to remain and we therefore allow his appeal, quash his conviction and set aside his sentence.

As to the first accused, even without his statement there was ample evidence of his guilt and we leave undisturbed his conviction and sentence.

Criminal appeal No. 43.

As regards the accused in appeal No. 43, here as already stated the accused was acquitted of a charge of unlawful possession of a pistol contrary to section 57(1)(a) and of ammunition contrary to section 57(1)(b) ISA and he was acquitted solely on the ground that by P.U.(A) 148/69 His Majesty has proclaimed all areas in the Federation to be security areas for the purposes of Part II of ISA, whereas under section 47 of ISA power is given to His Majesty to so declare for the purpose of Part III of ISA. I have already stated that the learned judge on reconsideration admitted he was in error and that I agree with him. The learned judge also said in his supplementary grounds that he thought that the various proclamations in 1964 making

various areas security areas and likewise the proclamation of 1969, P.U.(A) 148/69, have lapsed because of force of circumstances, and I have already given reasons why I think that here too the learned judge was in error.

The learned judge acquitted the accused at the end of the prosecution case without calling on him for his defence. With respect here too I think he was in error, because what he did is flatly opposed to regulations 13 and 17, reproduced above.

The armourer's report states that he tested the pistol in question and found that the ammunition inserted in it "did not fire off", and Mr. Jagjit Singh on behalf of the appellant argues that this also showed *mala fide* on the part of the Attorney-General when he elected to charge the accused under ISA. With respect I do not see merit in this argument. With regard to serviceability of the pistol Mr. Jagjit Singh argues that in the words of the definition in section 2 ISA, it must be a "lethal barrelled weapon from which any shot, bullet or other missile can be discharged," and that the prosecution has failed to prove this in light of the armourer's report. But the definition of firearm does not stop at the words reproduced, but goes on, "or which can be *adapted* for the discharge of any such shot, bullet or other missile ... and includes any *component part* of any such weapon as aforesaid." Four cases were brought to our attention: *Sulong bin Nain* v. *Public Prosecutor*,[15] *Ismail bin Haji Ibrahim* v. *Public Prosecutor*,[16] *Public Prosecutor* v. *Muniandy*[17] and *Lim Eng Koi* v. *Public Prosecutor*.[18] As stated by Willan C.J. in the fourth case the question whether an article comes within the definition of firearm is a question of fact which has to be decided in each individual case, and here, first, the definition says that a component part of a weapon is also a firearm and we have all the necessary parts of the pistol and, secondly, the armourer explained in his report that the weapon was in good condition except that the firing pin was broken at the forward end and the pistol could not fire because of the broken pin, that the pistol was not serviceable "in its present condition" but "if the firing pin is replaced with a good one, the pistol will be serviceable." So in my view it is certainly a weapon which can be adapted for the discharge of a bullet and therefore a firearm within the meaning of section 2. In any event, under regulation 21(6) the firearm and ammunition the subject of these charges are deemed to have been serviceable.

One last point. At the beginning of this appeal, we wondered whether in the absence of the accused who had not been served with the notice of appeal, with the appeal record nor with the notice of hearing we had jurisdiction to hear it. Datuk Yusuf for the Public Prosecutor says that we can under section 60(1) of the Courts of Judicature Act, 1964, and Mr. Jagjit Singh, counsel for the accused in the lower court on whom the appeal record and notice of hearing have been served and who has no instructions and whom we appointed *amicus curiae* to assist us, made no objection, and accordingly we heard argument on the basis that it was proper for us to hear this appeal in the absence of the accused in the circumstances described.

Our order in this appeal is that the appeal is allowed, the order of acquittal and discharge is set aside, and that the accused be retried before another judge.

Criminal appeal No. 46.

We have dealt with such points of law as are relevant to this appeal.

The evidence here was that there was a robbery on January 13, 1976 at about 12.30 p.m. in Penang, a police corporal in a radio car was instructed to go to 26 Lim Lean Teng Road, that on arrival the driver of the radio car was given a description of the robber by the victim who had been shot, that the police driver took the victim's employee and an Indian to look for the robber, that on arrival at the Ayer Itam and Kampar Road junction the two persons pointed out a Chinese (the accused), that the accused was asked to stop and raise his hands, but he refused, but that on the second challenge he put up his hands, that the police then searched him and found, tucked in his waist, a home-made revolver with five live bullets in the chamber, that the accused was then arrested. The accused in a statement from the dock denied having a gun and ammunition. In my opinion there was enough evidence on which if believed the learned judge who saw and heard the witnesses could have founded a guilty finding, and I would therefore dismiss this appeal.

Wan Suleiman F.J. concurred.

Raja Azlan Shah F.J.: I have had the advantage of reading in draft the judgment of the Lord President. I agree with his reasoning and with his conclusion with regard to the merits of all the four appeals. However, having regard to the importance of this appeal and the arguments delivered, it is only right that I should express my own reasons regarding the law argued before us.

The forefront of the argument raised before us on behalf of all the accused is that the 1975 regulations are void because Ordinance No. 1 of 1969 under which the regulations were made, and *a fortiori* the Proclamation of Emergency of 1969, the basis of the said Ordinance, have lapsed by effluxion of time. It is said that seven years have gone by since the 1969 Proclamation, that circumstances have since changed for the better and that we are now living in happier times, and therefore the Ordinance and consequently the Proclamation have outlived their purpose and must be considered repealed by effluxion of time. That is tantamount to saying that the Ordinance and the Proclamation can lose their force without express repeal. If that is the case, then it can be argued only on the premise that they have been repealed by implication. I am almost tempted to say that a little common sense is a valuable quality in the interpretation of an enactment. It cannot be gainsaid that a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with and repugnant to the provisions of an earlier enactment that the two can no longer stand together. It would be quite inapposite to now say that a "change of circumstances" is a later enactment. I know only of Scotland that an Act of the Scottish Parliament may lose its

force by effluxion of time. Even then, there must be contrary to practice which must be of some duration and general application. Lord Mackay has aptly described how a Scottish Act may be repealed when he said in *Brown* v. *Magistrates of Edinburgh*: [19]

"I hold it clear in law that desuetude requires for its operation a very considerable period, not merely of neglect, but of contrary use of such a character as practically to infer such completely established habit of the community as to set up a counter law or establish a quasi repeal."

It will be fatuous enough for us to accept the suggestion that the Ordinance and *a fortiori* the Proclamation can lose their force by a change of circumstances as outlined by counsel. Such trivial niceties are too palpable for construing the documents for it is essentially a question of construction.

Harun J. in Criminal Appeal No. 43 reached his conclusion on the basis of a general proposition which was enunciated by Lord Goddard C.J. and Devlin J. (as he then was) in *Willcock* v. *Muckle*.[1] That case is no doubt "illuminating" and it is only necessary to set out the facts to obtain its true perspective. Because of the imminence of outbreak of war in Europe in 1939, a state of emergency was declared in the United Kingdom in that year. In pursuance of that emergency the National Registration Act, 1939, was passed, and section 12(4) provided that it was to continue in force "until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing this Act came to an end". Thirty-two other Acts of Parliament which were passed at about the same time, and of which the Courts (Emergency Powers) Act, 1939, was one, contained the same or similar formula specifying their termination. On October 9, 1950, an Order in Council provided that the emergency that was the occasion for the passing of the Courts (Emergency Powers) Act, 1939, had ended. There was no similar Order in Council terminating the National Registration Act, 1939.

I now come to the facts. Section 6(4) of the National Registration Act, 1939 empowered a police constable in uniform to require a person to produce his national registration card. On December 7, 1950, the defendant, while driving his motor vehicle, was stopped by a police constable in uniform. The constable asked the defendant to produce to him his national registration card, and to make the story short, the defendant refused to do so and he was charged under the section. The justices found him guilty but because of the conduct of the police officer in question, they granted him a conditional discharge. The defendant appealed and because of the great importance of the case seven judges had been specially constituted to determine it.

The question which the judges had to decide was whether the National Registration Act, 1939, was still in force. Counsel for the defendant argued that although the emergency had many sides in relation to the national life of the country, there was in fact only one emergency that was the occasion for the passing of the National Registration Act, 1939 and the other 32 Acts. And because the emergency that was the occasion for the passing of the Courts (Emergency Powers) Act, 1939 had ended by virtue of the Order in Council of October 9, 1950, and, as that emergency was the same emergency in the case of the National Registration Act, 1939, the latter Act was no longer in force. Lord Goddard C.J., expressing the opinion of four other judges, preferred the argument of the prosecution that

"there can be different aspects of the same emergency and that if the Crown has considered that a particular aspect no longer exists, so that the emergency which occasioned that particular Act to be passed has ended, it does not follow that all the Acts concerning other aspects of the same emergency are terminated."

The learned Chief Justice said that on the true construction of the formula used in all the "emergency" Acts, it was contemplated that to bring any one of those Acts to an end, there must be an Order in Council concerning that particular Act, and that could be done on different dates. He concluded that the National Registration Act, 1939 had not been terminated as there was no Order in Council terminating it.

In the course of the judgment the learned Chief Justice made two observations and the one that concerns us is in respect of law enforcement. After making an observation that he agreed with the justices that in view of the conduct of the police officer in question, the appellant was rightly given a conditional discharge, he went on to say that the police should not as a matter of routine use the power given to them under section 6(4) of the National Registration Act, 1939, because in 1950 the purpose of that Act had lapsed. The merits of each case must be looked into, and he drew a distinction between the ordinary case of "a woman who has left her car outside a shop longer than she should, or on some trivial occasion of that sort", and the case "where there is a real reason for demanding sight of the registration card". His main reason of exhorting the police to refrain from doing acts which he said was "wholly unreasonable" was to maintain the "good feeling that exists between the police and the public". It was with that object in mind that the learned Chief Justice made the observation relied upon by Harun J. Devlin J. also made a similar observation which found favour with Harun J. In my judgment the general observations made by them must be taken with reference to the particular question before them, and I think their language itself, if rightly understood, show that they meant that. If their observations are limited to the particular facts of the case, they may be correct, but if they are meant to be of general application, I think they go too far. It would be going too far to say that both the learned judges laid it down as a proposition of law that an Act of Parliament can be repealed by the force of changed circumstances. I think that cannot be extracted from their judgment. I therefore reject the argument that *Willcock* v. *Muckle*, *supra*, assists the accused. In fact that case is against him.

The reliance placed by Harun J. on the passage enumerated by Lord Reid in the *Earl of Antrim's*[2] case is also misplaced. On closer examination that passage, read together with the next sentence, reveals the *ratio* of the case, *i.e.*,

"a statutory provision is impliedly repealed if a *later enactment* brings to an end a state of things the continuance of which is essential for its operation."

The Irish Free State (Agreement) Act, 1922 created two political entities, the Irish Free State which became a Dominion within the Commonwealth (and in 1949, became a Republic) and Northern Ireland which remained part of the United Kingdom. As a result of the changes made by the Act of 1922, Ireland as a political entity ceased to be part of the United Kingdom. The question then was whether the right of Irish peers to sit and vote in the House of Lords continued after 1922. The House of Lords answered it in the negative. Viscount Dilhorne (page 1152) saying that since Ireland as a political entity had ceased to be part of the United Kingdom it follows that the Irish peers could not sit and vote in the United Kingdom Parliament to represent a territory which had ceased to exist. "For these reasons," said Viscount Dilhorne "that part of the Union with Ireland Act (1800) which provided for the election of Irish peers to the House of Lords must be regarded as having become spent or obsolete or impliedly repealed in 1922." That case therefore does not bear out the proposition that an enactment may be impliedly repealed by the force of changed circumstances. It is explicable on the basis that an enactment is impliedly repealed when the provisions of a later enactment are so inconsistent or repugnant to the provisions of the earlier enactment that the two cannot stand together. I would say it again that I do not find anything in that case which can be of assistance to the accused.

There is an inherent danger in reading a passage from a judgment as if it affords the *ratio decidendi* of a case. A judge before he arrives at his decision derives much help from a consideration of reported decisions but he will always remember that most of these reported decisions merely record what the ruling of another judge has been in another case and in the particular circumstances of that case and on the basis of its own particular facts.

A subsidiary argument raised is this. There had been two Yang di-Pertuan Agongs who had succeeded the Yang di-Pertuan Agong who issued the Proclamation and that is a factor to be taken into account in determining that it has outlived its purpose. I think the reasoning is based on the belief current in the latter part of the fifteenth century when the Tudor and Stuart Proclamations were considered inferior to by-laws in respect of their permanence so that the Royal Proclamations were only in force during the life of the sovereign who issued them (see Vol. IV, Holdsworth History of English Law, page 100). That belief can no longer hold good with the growth of the modern constitutional state.

I accept the view expressed by Abdoolcader J. in *Re Tan Boon Liat*[14] that the Ordinance and *a fortiori* the Proclamation are "still in force in law and in fact." The important characteristics of the Proclamation and the Ordinance promulgated under clause 2 of Article 150 of the Constitution are their operative nature and the necessity of laying them before both Houses of Parliament which thus can exercise constant supervision and review. This type of emergency legislation remains in force unless sooner revoked by His Majesty or annulled by resolutions of both Houses of Parliament.

Incik Rajasingam in the course of an interesting and vigorous submission, and adopted by other counsel before us, impeached the 1975 regulations on another ground, *i.e.*, sub-delegation of power to the Attorney-General to alter the mode of trial of persons accused under the Internal Security Act, 1960 (Revised — 1972). That he says is *ultra vires* Ordinance No. 1 of 1969, basing his argument on the dissenting judgment of Ong F.J. in *Public Prosecutor* v. *Khong Teng Khen*.[7] I accept the view that the 1975 regulations are subsidiary legislation and the question before the learned judge then, and now before us, is whether they are *ultra vires* Ordinance No. 1 of 1969. The reasoning of the learned judge (page 174) seems to be that "No limitation was imposed under the first 1975 regulations, though under the second, it was left to the Attorney-General's opinion whether the offence is one affecting the security of the Federation". That, in his opinion, is sufficient to render those regulations *ultra vires* Ordinance No. 1 of 1969. In other words it is said that that is a case of excessive delegation; His Majesty cannot and shall not sub-delegate to the Attorney-General the powers which are exclusively exercisable by him alone and amounting to an abdication of such powers *pro tanto*. With due respect to the learned judge, I think his opinion rests upon a mistaken view of the powers of His Majesty to issue ordinances having the force of law under Article 150(2) of the Constitution, and indeed of the nature and principles of legislation. His Majesty has powers expressly limited by Article 150(2) of the Constitution which created it, and he can, of course, do nothing beyond the limits which circumscribe those powers. But when acting within those limits, he has, and is intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The courts must of necessity determine, when the question arises, whether the prescribed limits have been exceeded: and the only way in which it can properly do so is by looking at the terms of the instrument by which, affirmatively, the legislative powers are created, and by which, negatively, they are restricted. If what has been done is legislation, within the ambit of the affirmative words which gives the power, and if it does not violate any express condition or restriction by which that power is limited, it is not for this court, or for that matter any court, to inquire further, or to enlarge constructively those conditions and restrictions.

The 1975 regulations derive their force from Ordinance No. 1 of 1969 by which the legislative power is given and not from the authority by whom the power is exercised. Within the limits prescribed by Article 150(2), His Majesty has promulgated Ordinance No. 1 of 1969, which by its essential nature is an enabling instrument giving to himself power to make regulations widely envisaged in section 2, *inter alia*, power in paragraph (b) to "create offences and prescribe penalties. . . ." The 1975 regulations, in particular regulation 2(2) of P.U.(A) 362/75, have been made under section 2 of the Ordinance and their

subject-matter is clearly within the language of section 2 of the Ordinance.

Next the question arises whether the power conferred upon the Attorney-General under regulation 2(2) of P.U.(A) 362/75 is delegated to him, namely, sub-delegation of His Majesty's power to the Attorney-General to alter the mode of trial. The better view is that His Majesty is doing no more than delegate his legislative function to the Attorney-General. A duty is imposed on the Attorney-General to decide in each case by issuing a certificate whether it is a security case affecting the Federation. Here the Attorney-General has to form an opinion in the exercise of a legislative discretion. His discretion is apparently at large and what weight or influence each case is to have upon his mind is not made clear. The objection to regulation 2(2) is that it furnishes no standard when a case is certified as one affecting the security of the Federation, whether it is one under the Arms Act, Act 21 of 1960, the Firearms (Increased Penalties) Act, Act 37 or the Internal Security Act, and hence leaves the matter to the Attorney-General's arbitrary judgment, whim and caprice. The discretion no doubt gives to the Attorney-General a wide charter which it might have been thought he is ill-equipped to exercise. However, the terms of regulation 2(2) "in the opinion of the Attorney-General, affects the security of the Federation", like other general terms, acquire precision from the sense and experience of the Attorney-General, and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore the law properly relies. In this connection it is not inapposite to quote the following passage from the speech of Lord Macmillan in *Liversidge* v. *Anderson*: [20]

"The statute has authorized (the power) to be conferred on ... one of the high officers of State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information. In a question of interpreting the scope of a power it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility."

I think it is a fallacy to speak of the power thus conferred upon the Attorney-General as if, when it is exercised, the efficacy of the acts done under it would be due to any other legislative authority than that of His Majesty. The whole operation of regulation 2(2) is, directly and immediately, under and by virtue of His Majesty's legislative power under Ordinance No. 1 of 1969. What the Attorney-General is required to decide, in my opinion, is in truth a function of His Majesty's legislative power. The true distinction therefore, is, between the power to make the law, *i.e.*, altering the mode of trial, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion upon the Attorney-General as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; that would involve a delegation by His Majesty of his legislative power which is invalid as going too far and amounting to an abandonment of his function and duty. There is no valid objection to the second. His Majesty has not delegated to the Attorney-General any authority or discretion as to what the law shall be — which would not be allowed — but has merely conferred upon him an authority or discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is permissible. His Majesty himself has passed upon the expediency of the law, and what it shall be. The Attorney-General is entrusted with no authority or discretion upon these questions. The answer which the decision of the Supreme Court of the United States supplies to this kind of question and which is of some assistance to us is formulated in the opinion of McKenna J. in *Mutual Film Corporation* v. *Industrial Commission of Ohio*: [21]

"While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

Whether it is wise or not to confer authority or discretion upon the Attorney-General to certify a security case under the 1975 regulations is not for us to say, but in doing so I cannot see that His Majesty has transcended his constitutional authority. In the circumstances indicated above the 1975 regulations are not *ultra vires* Ordinance No. 1 of 1969 being neither a case of excessive delegation nor abdication of legislative authority.

Another attack upon the Attorney-General's alleged unlawful act is put in two ways. First it is said that preferring a charge against the accused under the Internal Security Act rather than under the Arms Act or the Firearms (Increased Penalties) Act demonstrates the discriminatory character of his discretion and contravenes the equal protection clause of Article 8 of the Constitution. In my opinion, the policy underlying regulation 2(2) of P.U.(A) 362/75 is to regulate the trial of persons charged with security offences to be "dealt with and tried in accordance with the 1975 regulations." The grant or refusal of the Attorney-General's certificate is thus to be governed by this policy and the discretion given to him is to be exercised in such a way as to give effect to this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample remedy elsewhere to sanction him. In view of the foregoing I consider that there is enough guidance to the Attorney-General in the use of his discretion under regulation 2(2) of P.U.(A) 362/75 and I therefore reject the contention that the said regulation is obnoxious to the equal protection clause of Article 8. I need only add that it cannot be disputed that the guidance which I have held can be derived from the regulations, and that it bears a reasonable and rational relationship to the object to be attained by them, and, in fact will fulfil the purpose which they seek to achieve, *i.e.*, that all persons charged with security offences are dealt with and tried in accordance with the said regulations.

The second ground upon which the Attorney-General's alleged *ultra vires* act is called in question is the contention that under regulation 2(1) of P.U.(A) 362/75 only the Attorney-General can certify "security offences", and if, as is alleged, it is certified by a Deputy Public Prosecutor then it amounts to a sub-delegation of power to the Deputy Public Prosecutor and is bad. A further submission is to the effect that here we must not confuse the sanction as required under section 80 of the Internal Security Act and the discretion vested in the Attorney-General by regulation 2(1). A sanction, it is urged, may be signed by a Deputy Public Prosecutor but the discretion conferred upon the Attorney-General by regulation 2(1) cannot be sub-delegated to a Deputy Public Prosecutor. As against that submission Datuk Yusuf takes the point that it is essentially a question of construction. He says the operative words of section 80 of the Internal Security Act are "with the consent of the Public Prosecutor"; the word "personally" is not there, and therefore he concludes by virtue of the absence of the word "personally" or the like effect, a Deputy Public Prosecutor may sanction prosecution under the Internal Security Act, and *a fortiori* certify that a particular case is a security offence under the regulations. He submits that a Deputy Public Prosecutor is vested with the power of the Public Prosecutor not by virtue of delegation of power, but vested in him by written law passed by Parliament (section 376(3) Criminal Procedure Code). In my judgment, the maxim *delegatus non potest delegare* is essentially a rule of construction. In private law the maxim is well known and is taken to mean that a person who has delegated authority cannot without express power or statutory authority further delegate such authority. (*Broom's* Legal Maxims, 10th edition, 570; *Halsbury's* Laws of England, 3rd edition, Vol. 1, page 169). Professor *de Smith* puts it in this way:

"The maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception; it is a rule of construction to the effect that 'a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute'."

(Judicial Review of Administrative Action, 3rd edition, page 265). He gives an illustration on page 269 of his book which I think is taken from the case of *R.* v. *Halkett*: [22]

"Where the exercise of a discretionary power is entrusted to a named officer — e.g., a chief officer of police, a medical officer of health, a town clerk or an inspector — another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy to act as an authorised agent very clearly outweighs the desirability of maintaining the principle that the officer designated by statute should act personally."

In *R.* v. *Halkett, supra,* the question arose under the Sunday Observation Prosecution Act whether a police officer who is in temporary command during the absence of the chief constable can effectively consent to proceedings instead of the chief constable, and the court held that he could not. This decision appears now to be qualified for boroughs by the Police (Consolidation) Regulations, S.I. No. 1216 of 1948, regulation 3, which provides that the watch committee in a borough may appoint a deputy chief constable who shall, in the absence or incapacity of the chief constable or during any vacancy in that rank, have all the powers and duties of the chief constable not specifically excluded by resolution of the committee. It seems clear that a deputy appointed under this regulation could give a statutory consent; but the regulation applies only in boroughs.

On principle therefore it must be held that when an enactment specifically designates a named officer, e.g., the Attorney-General, to sanction prosecution under section 80 of the Internal Security Act or to certify a security offence under regulation 2(1) of P.U.(A) 362/75, the said officer cannot delegate his power to another officer unless of course there is express statutory authority for the appointment of a deputy. In the present case there is express statutory authority given to a Deputy Public Prosecutor to exercise all or any of the rights and powers vested in the Public Prosecutor under the Criminal Procedure Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally (section 376(3) Criminal Procedure Code). It does not appear to me that there is any distinction between the sanction enacted in section 80 of the Internal Security Act and the discretion envisaged in regulation 2(1). Both seem to be aimed at the same thing, i.e., empowering the Attorney-General to do a certain act in one way or another.

It is also argued that preferring a charge under section 57 of the Internal Security Act when the prosecution knew very well that the firearm could not be used is a sign of bad faith. In appeal No. 43 the gun was defective in the sense that the firing pin was broken but the prosecution had failed to disclose that through the evidence of the armourer. In fact he was not called as a prosecution witness but was offered to the defence who then learnt from his report that the gun was defective. By that it is ably insisted that the prosecution had acted in bad faith. That argument displays dialectical ingenuity, but it has no bearing on the result of this appeal and I think it can be very shortly answered. The prosecution is not required to prove that the gun is in a serviceable condition. Regulation 21(6) of P.U.(A) 362/75 merely enacts that a firearm used in a security case is *deemed* to have been in a serviceable condition, thus shifting the onus upon the defence to show otherwise. In my opinion, that is only an evidentiary rule altering the burden of proof in the ordinary case of possession of a firearm, and requiring certain pre-appointed evidence to fit the special circumstances in the interest of justice, because the accused knows best the facts, and leaving the court with this provision to examine the facts and determine the matter.

Another ground of appeal concerns proof of security area. Harun J. in appeal No. 43 was of the opinion that the prosecution had not proved to his satisfaction that the accused committed the acts in a security area. The learned judge had since, in a supplementary judgment, realised and corrected his error. Proclamation P.U.(A) 148/69, a subsidiary legislation made under the authority of section 47 of the Internal Security Act, refers to all areas in the Federation to be security areas for the purposes of Part II of the

said Act. In 1972 the Internal Security Act was revised and the sections under which the accused was charged were placed in Part III of the revised Act, but the word "Part II' referred to in the said Proclamation was not revised. Hence Harun J. held that proof that the acts were committed in a security area was not established. In my opinion, the matter can easily be resolved by invoking section 12 of the Revision of Laws Act, 1968, Act 1 which enacts:

"12. Subsidiary legislation made under any law and in force on the date on which that law as revised comes into force shall continue in force until otherwise provided; and references in any such subsidiary legislation to the law under which it was made, or to any part thereof, or to any other revised law shall be construed as references to the revised law or to that other law as revised."

I agree with the learned Lord President that *Samivellu* v. *Public Prosecutor*[8] was wrongly decided. Proclamation P.U.(A) 148/69 is law which the court can take judicial notice. Judicial notice is the cognizance taken by the court itself of certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary; see *Phipson* on Evidence, 11th Ed., page 10. "With regard to the facts enumerated in section 57, if their existence comes into question, the parties who assert their existence or the contrary need not, in the first instance, produce any evidence in support of their assertions. They need only ask the judge to say whether these facts exist or not, and if the judge's own knowledge will not help him, then he must look the matter up; further the judge can, if he thinks proper, call upon the parties to assist him. But in making his investigation the judge is emancipated from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, which he thinks help him": see *Woodroffe & Ameer Ali* on Law of Evidence, 12th Ed., Vol. 2, page 1143. Judicial notice can therefore be taken of P.U.(A) 148/69 issued by His Majesty in the exercise of legislative power. But judicial notice cannot be taken of a notification issued by any authority in the exercise of its executive functions.

Order accordingly.

Solicitors: *R. Rajasingam & Co.; Chew & Co.; Jagjit Singh & Co.; Karpal Singh & Co.*

CHONG SOON KOY v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Wan Suleiman F.J.) March 26, 1977]
[Kuala Lumpur — Federal Court Criminal Appeal No. 44 of 1976]

Criminal Law and Procedure — Possession of firearm and ammunition — Trial under Internal Security Act — Security case — Admissibility of statement leading to discovery of firearm and ammunition — Evidence Act, 1950, s. 27 — Internal Security Act, 1960, ss. 57 and 80.

Evidence — Statement leading to discovery of firearm and ammunition — Admissibility — Evidence Act, 1950, s. 27.

This was an appeal from the judgment of the High Court convicting the appellant on charges of possession of a firearm and ammunition under the Internal Security Act. On appeal the main contentions were against the trial of the case as a security offence and against the admissibility of a statement leading to the discovery of the firearm and ammunition.

Held: (1) the 1969 Proclamation of Emergency is still in force and therefore the Emergency (Essential Powers) Ordinance, 1969 and the Essential (Security Cases) Regulations, 1975 are still in force;

(2) the Essential (Security Cases) Regulations are not *ultra vires* the Emergency (Essential Powers) Ordinance, 1969;

(3) there has been no improper use of section 57 of the Internal Security Act in this case;

(4) the sanction of the charge against the accused did not require the signature of the Public Prosecutor personally;

(5) the statement relating to the discovery of the firearm and ammunition was rightly admitted in evidence.

Cases referred to:-

(1) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

(2) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.

(3) *Pulukuri Kotayya v. King Emperor* 74 I.A. 65.

The following authorities were also cited in argument: *Earl of Autrim* [1966] 3 W.L.R. 1141; *British Coal Corporation* v. *R.* [1935] A.E.R. Reprint 139, 146; *Willcock* v. *Muckle* [1951] 2 K.B. 844, 851; *Koltaya* 34 I.A. 65; *Shri Irfan Ali* [1970] Cr. L.J. 603; *Karam Din* A.I.R. 1929 Lahore 338, 339; *Deoman* (1960) 61 Cr. L.J. 1505 and A.I.R. 1960 S.C. 1125; *Soh Ten Seng* [1964] M.L.J. 380, 381-2; *Chua Eow Huat* [1970] 2 M.L.J. 29; and *Lee Boon Gan* v. *Regina* [1954] M.L.J. 103.

FEDERAL COURT.

R. Rajasingam (*Ajmer Singh* with him) for the appellant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Suffian L.P. (delivering the judgment of the Court): This is an appeal from the judgment of the High Court in Penang convicting the appellant on a charge under para. (a) of subsection (1) of section 57 of the Internal Security Act ("ISA") and on another charge under para. (b) of the same provision.

It is submitted that the 1969 Proclamation of Emergency published as P.U.(A) 145/69 has by force of changed circumstances and effluxion of time ceased to be in force and therefore Ordinance No. 1 ("the Ordinance") published as P.U.(A) 149/69 is no longer in force and further His Majesty therefore no longer has power to make the Essential (Security Cases) Regulations, 1975, published as P.U.(A) 320 and 362 of 1975 ("the 1975 regulations"), in accordance with which the accused was charged, tried, convicted and sentenced to death. The submission is made by Mr. Rajasingam on the same lines as he did in Federal